

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1126

77-1126

B
P/S

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,

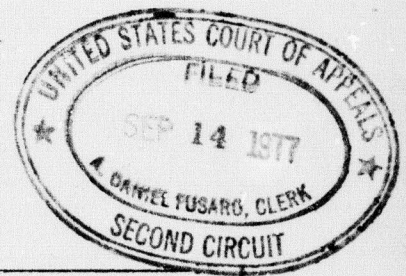
Plaintiff-Appellee

Against

CLAYTON GREEN,

Defendant-Appellant

Appeal from Orders and Judgment of the
United States District Court for the
Western District of New York



BRIEF FOR DEFENDANT-APPELLANT

DOYLE & DENMAN
GEORGE P. DOYLE, ESQ. of Counsel
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-1126

UNITED STATES OF AMERICA,

Appellee

v.

CLAYTON GREEN,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ISSUE PRESENTED

Was appellant denied a speedy trial under the Speedy Trial Act, 18 U.S.C. Section 3161 et seq. and the rules promulgated by the District Court for the Western District of New York pursuant to 18 U.S.C. Sections 3165 and 3166.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3161 provides in pertinent part:

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, with the district, as fixed by the appropriate judicial officer.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to -

(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from trials with respect to other charges against the defendant;

(D) delay resulting from interlocutory appeals;

(E) delay resulting from hearings on pretrial motions;

(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when the whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

18 U.S.C. § 3163 provides in pertinent part:

(b) The time limitation in Section 3161(c) of this chapter -

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
NEW YORK PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES
in pertinent part provides:

§5. Time Within Which Trial Must Commence.

(a) Time Limits. The trial of a defendant shall commence within the following time limits:

(1) If the arraignment occurs before July 1, 1976, within 180 days of July 1, 1976.

§11. Sanctions.

(e) Dismissal Not Required. Except as required by 18 U.S.C. §5036, failure to comply with the time limits prescribed herein shall not require dismissal of the prosecution. The court retains the power to dismiss a case for unnecessary delay pursuant to rule 48(b) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Clayton Green appeals from an Order of the United States District Court for the Western District of New York, John T. Elfvin, District Judge, sentencing him under the Young Adult Correction Act, 18 U.S.C. Sections 4209, 5010(c), to the custody of the Attorney General for treatment and supervision for a period of eight years, which sentence was entered upon defendant's plea of guilty. Defendant's right to appeal his conviction on the grounds that he was denied a speedy trial was specifically reserved, with the consent of the government and the District Court, at the taking of the guilty plea January 27, 1977.

STATEMENT OF FACTS

Defendant Clayton Green was arrested December 2, 1975, and on December 8, 1975, together with a co-defendant was indicted on three counts, arising out of a single incident, alleging violations of various subsections of 18 U.S.C. Section 2113, the Federal bank robbery statute. Defendant was arraigned on this indictment December 18, 1975. After submission and argument of discovery motions before the United States Magistrate

(pursuant to the usual procedure in the Western District that discovery motions are supervised by the magistrate), discovery was completed February 24, 1976 and the case file returned to the District Judge. After a pre-trial conference, adjourned to and completed on March 24, 1976, no action whatever was taken on the file until January 17, 1977, when the court set the case for trial January 20, 1977. On January 19, 1977, the government requested that the trial be further delayed, and set a new trial date of February 1, 1977, which was subsequently changed to January 27, 1977.

At the scheduled trial date, defendant moved for dismissal on the ground that he had not been afforded a speedy trial, which motion was denied.¹ Defendant then offered to plead guilty to the second count of the indictment, charging bank theft under 18 U.S.C. Section 2113(b) on condition that he be allowed to appeal the denial of his motion to dismiss on speedy trial grounds. The court accepted this plea, and on February 14, 1977, sentenced defendant to custody of the attorney general for

1

The docket sheet entry for that date reads:

Deft. orally moved for dismissal for failure to afford speedy trial; court denied, the motion as there is no mandate for the court to dismiss and remains within the discretion of the court though technically the six month period has been exceeded.

treatment and supervision for a period of eight years, pursuant to 18 U.S.C. Section 5010(c) and 4209, with the court's recommendation that the sentence be served concurrently with the state sentence, for which defendant was then and is now incarcerated at Attica Correctional Facility.

ISSUE PRESENTED

WAS APPELLANT DENIED A SPEEDY TRIAL UNDER THE SPEEDY TRIAL ACT, 18 U.S.C. SECTION 3161 ET SEQ. AND THE RULES PROMULGATED BY THE DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK PURSUANT TO 18 U.S.C. SECTIONS 3165 AND 3166.

ARGUMENT

In order to facilitate the prompt disposition of criminal cases and to minimize undue delay Congress passed Chapter 208 of Title 18 of the United States Code. This chapter sets up various time periods within which criminal cases must proceed. The time period which forms the basis of this appeal is the delay involved between the date of indictment and the trial of the indictment.

Section 3161(c) of Title 18 sets forth a sixty day time period within which a defendant must be tried after he is indicted. This sixty day time period is modified by 18 U.S.C. Section 3161(g) wherein a one hundred eighty day time period is allowed for those cases which were indicted in the first twelve-calendar-month period following the effective date of 18 U.S.C. Section 3161. As set forth in 18 U.S.C. Section 3163(b), the effective date for the implementation of 18 U.S.C. 3161(c) is upon the expiration of the twelve-calendar-month period following July 1, 1975. In accordance with Chapter 208 of Title 18 the United States District Court for the Western District of New York promulgated a plan for the prompt disposition of criminal cases. The time limitation set forth in the said plan is in accordance with the time period set forth in Chapter 208 of Title 18.

Accordingly, since the effective date of the time limitation set forth in 18 U.S.C. 3161(c) is July 1, 1976, the time computation involved in this appeal will commence as of July 1, 1976. Therefore, the time period between July 1, 1976 and January 27, 1977, the date the Assistant United States Attorney stated he would be ready for trial, is 211 days. This 211 day period exceeds the 180 day period set forth in both Title 18 U.S.C. Section 3161(c) & (g) and the rules promulgated by the District Court for the Western District of New York.

The docket sheet (A-2) contains a notation of a 13 day excludable delay. This delay should not be excludable because it was requested by the Assistant United States Attorney in order to obtain the presence of an essential witness, Michael Green (A-2). Michael Green was, on January 20, 1977, serving a term of imprisonment pursuant to a conviction in the Supreme Court of the State of New York. Accordingly, Title 18 U.S.C. Section 3161(3)(A) & (B) does not allow excludable delay where the whereabouts of an essential witness is known and where with due diligence he could have been produced for the

trial. This is exactly the situation involved with the production of Michael Green. That is, his whereabouts were, or should have been, known to the United States Attorney and consequently the delay involved in producing Michael Green should not be excludable delay.

Whether or not the 13 day period noted in the docket sheet is excludable delay, the 180 day time limitation has none the less been violated. Because the sanctions imposed by Title 18 U.S.C. Section 3162 (2) are not in effect, it is necessary to look to the Plans promulgated by the United States District Court in order to determine how to dispose of a case wherein the 180 day time limitation has been exceeded. Section 11 of the Rules of the United States District Court set forth the sanctions to be imposed. Subsection (e) of Section 11 does not require dismissal of the indictment where the 180 day limitation has been exceeded. It is the defendant's contention, however, that Judge Elfvin exceeded his discretion by denying the defendant's motion.

Judge Elfvin, in deciding the defendant's motion to dismiss for failure to provide a speedy trial, found that the six month period had been exceeded, but in the absence of a mandate for the court to dismiss the indictment Judge Elfvin

denied the motion. It appears from Section 11(e) of the Rules promulgated by the United States District Court for the Western District of New York that the time period imposed both by Title 18 U.S.C. Chapter 208 and the Rules of the District Court that although dismissal is not required, it is within the judge's power. In view of the mandatory nature of the time limitations set forth, the failure by the government to conform to those time limitations should not be viewed lightly. Therefore, once Judge Elfvin made a finding that the 180 day period had been exceeded, especially in view of the fact that the 180 day period was measured from July 1, 1976 rather than from February 24, 1976, the date when discovery was completed, if the time periods set forth in both the Rules of the District Court for the Western District of New York and Title 18 U.S.C. Section 3161 are to have any meaning, this indictment should have been dismissed.

CONCLUSION

The defendant's conviction should be reversed and the indictment should be dismissed.

Date: July 20, 1977

Respectfully submitted,

DOYLE & DENMAN
George P. Doyle of Counsel
Attorneys for Appellant
Office and P. O. Address
10 Ellicott Square Building
Buffalo, New York 14203

APPENDIX TABLE OF CONTENTS

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Court Docket Sheet A-1

DISTRICT COURT - CRIMINAL DOCKET

JOHN T. ELFV

Case Filed

Yr.

Docket No.

JUDGE/Assigned Trial
MAGISTRATE 0906
209 1
District/Office

U.S. vs. GREEN, CLAYTON

8 12

75

265

No. 3
of
Defendants

defendant

COUNTS

MAGR. CASE NO. 75-219 M

BAIL RELEASE

☐ Denied ☐ Personal Recognizance
☐ AMT ☐ Unsecured Bond
☐ Set (000) ☐ Conditional Release

\$ 10
12/2/75
date ☐ 10% Deposit
☐ 15% Deposit
☐ Collateral
☒ Bail Not Made
☒ Bail Status Changed
(See Docket) ☐ 13th Party
☐ PSA

13-2113(a) & 2

Bank Robbery by force & violence
(Ct. 1)

1

13-2113(b) & 2

Bank Theft (Ct. 2) (take & carry
away with intent to steal & purloin
money belonging to an FDIC-Insured bank)

1

13-2113(d) & 2

Bank Robbery with a dangerous weapon
(Ct. 3)

1

U.S. Attorney or Asst.

Edward Wagner, AUSA
U.S. Courthouse, Bflo
432-3479

Defense: ☐ CJA, ☒ Ret, ☐ L Waived, ☐ L Self, ☐ L None, ☐ L Other, ☐ L PD, ☐ L CD
George Doyle
10 Ellicott Sq. Bldg.
Buffalo, N.Y. 14203 (716) 856-3486

ARREST

INDICTMENT

ARRAIGNMENT

TRIAL

SENTENCE

12/2/75

U.S. Custody
Began on Report
Charges

☐ High Risk
Deft. &
Data Design'd

Information ☐
12/8/75Waived ☐

Superseding
☐ Indict/Info ☐

☐ Prosecution Deferred

12/18/75

Trial Set For

Voor Dire ☐

1st Plea

12/18/75

Final Plea

1/27/77

☒ Not Guilty☐ Nolo☐ Guilty☐ Not Guilty☐ Nolo☒ GuiltyTrial Began ☐none ☐Trial Ended ☐

Disposition

1/27/77

2/16/77

☒ Convicted☐ Acquitted☐ Dismissed☐ Nollo/Discontinued☐ All Charges☐ Ct.☐ WOODLAWN☐ Nollo/Discontinued☐ WOODLAWNSearch
Warrant

Issued

Return

Summons

Issued

Served

Arrest Warrant

12/2/75

EFM/090A

COMPLAINT

12/2/75

EFM/090A

OFFENSE
(In Complaint)

18 USC §2113(a)&(d) armed robbery of federally insured monies
of Manufacturers and Traders Trust Co., Woodlawn, N.Y.

OUTCOME

☐ Dismissed☐ Held for☐ District GJ☐ Held to Answer to U. S. District Court☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND☐ AT:☐ Magistrate's Initials☐ Exonerated☐ To Transfer District☐ BOND

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
1/20/76	Proceedings before the Magistrate - No appearance for defendant; New discovery schedule set- Motions are to be filed by 1/26/76; the Govt., is to respond by 1/30/76 and argument is scheduled for 2/3/76 at 10:30 a.m.				
1/27/76	Proceedings before the Magistrate - No motions have been received. Mr. Doyle will be contacted to see if he intends to file motions.				
2/3/76	Proceedings before the Magistrate - No appearance for deft.; Adj. 2/10/76 for argument				
2/6/76	Filed Govt's response to pre-trial discovery motions by deft. Fred Davis.				
2/9/76	Filed notice of motion ret. 2/10/76 for an order directing that the U.S. Atty. give notice to the deft. of the govt's intention to use any evidence which the deft may be entitled to discover under Rule 16, etc.				
2/10/76	Proceedings before the Magistrate - At Mr. Doyle's request, argument on the Clayton Green motions has been adj. to 2/17/76				
2/17/76	Adjourned to 2-24-76 at Govt's request.				
2/18/76	Filed Govt's discovery response.				
2/24/76	Proceedings before the Magistrate - Oral argument on deft's discovery motions. Discovery is now complete. File to go to Clerk				
3/15/76	The Court ordered a conference				
3/19/76	Determination of counsel - the court adj. inquiry as to representation on 3/24/76				
3/24/76	Atty. Doyle advised the Court he has been retained by the parents of Deft. Fred Davis to represent Fred Davis in Crim. Case # Cr-76-31 only, and he will continue to represent Deft. Clayton Green in Cr-75-265. Deft. Fred Davis was present in Court.. The Court directed Cr-76-31 To proceed to trial before CR-75-265.				
3/24/76					
1/17/77	Court will set a trial date.				
1/19/77	Filed affidavit by AUSA Edward Wagner re his request to the court that the trial not begin against Clayton Green on-1/20/77, because of the absence of essential witness - Co-Deft. Michael Green				
1/19/77	Court advised that trial will not start on 1/20/77, but court is desirous to starting trial on 2/1/77, AUSA directed to keep the Court advised.	3	1/20/77 2/1/77	M	13
1/25/77	Filed Pet. and Order for Writ of H.C. Ad Proseq. for Trial, ret. 1/27/77--Maxwell, Magistrate				
1/26/77	Filed Pet. & Ord. For W.H.C.P., for witness Fred Davis - ret. 1/27/77-Elfvn, J.				
		(a)	(b)	(c)	(d)
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days
		A-2			

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U.S. vs

Clayton Green

75

265

1

Yr. Docket No. Def.

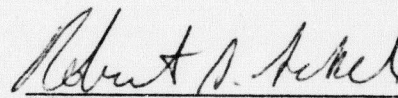
DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY
(Document No.)		(a) (b) (c) (d)
1/27/77	Deft. orally moved for dismissal for failure to afford Speedy Trial; Court denied, the motion as there is no mandate for the Court to dismiss and it remains within the discretion of the Court though technically the six month period has been exceeded, Court accepted a plea of guilty to Count Two by the defendant Clayton Green; sentencing set for 2/14/77. Deft. is in custody of State and serving a sentence at Attica.	
2/4/77	Filed subpoena - Herman Embry, served 1/26/77	
2/9/77	Filed Marshal's return of Writ of Habeas Corpus Ad Testificandum.	
2/14/77	Deft. is sentenced pursuant to Section 5010(c) Title 18, U.S.C. to the custody of the Atty. General for treatment and supervision for a period of eight years. The Court will make recommendation that it is concurrent with any State sentence of imprisonment. Counts one and three are dismissed. ELFVIN	
	/S/JTE said sentence be served at the State institution where defendant is incarcerated and concurrently therewith. ELFVIN, J.; Cts. One and three are dismissed.	
2/16/77	Filed Judgment and Commitment. Commitment issued.	
2/23/77	Filed Deft's notice of appeal from the judgment of conviction	
2/25/77	Cy. of deft's notice of appeal mailed to Govt., and to the CCA with statement of docket entries	
3/9/77	Filed W.H.C.A.P. for Clayton Green, executed 3/8/77	
	CLOSED	

AFFIDAVIT OF SERVICE

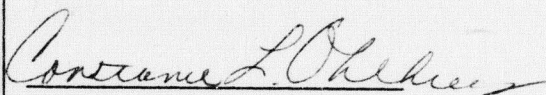
STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

ROBERT S. SICHEL, being duly sworn, deposes and says:

1. That on the 20th day of July, 1977, deponent served two copies of the brief in the case of the United States of America vs. Clayton Green, Docket Number 77-1126 upon the United States Attorney by depositing the same enclosed in a post paid properly addressed wrapper in a post office depository under the exclusive care and custody of the United States Post Office.


ROBERT S. SICHEL

Sworn to before me this
20th day of July, 1977.



CONSTANCE L. OHLRICH
COMMISSIONER OF DEEDS
In and For the City of Buffalo, New York
My Commission Expires Dec. 31, 1978